

United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR
LAKE (a corporation), organized and
existing under the laws of the State
of Arizona,

Plaintiff in Error,

VS.

BANK OF WOODLAND (a corporation),
STEPHENS AGRICULTURAL AND LIVE-
STOCK COMPANY (a corporation), JOSEPH
CRAIG, P. N. ASHLEY, J. L. STEPHENS,
J. J. STEPHENS, L. D. STEPHENS and
N. A. HAWKINS,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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Statement of Facts.

The facts may be very briefly stated. In 1907 defendants in error agreed in writing to sell to one Vandercook certain shares in the Yolo County Con-

solidated Water Company. Vandercook made part payment of the purchase price and in 1912 defendants in error refused to proceed with the contract, in fact repudiated it.

This was the situation in 1913. On April 9, 1913, the Power & Irrigation Company of Clear Lake, plaintiff in error, was organized as *an Arizona* corporation. Both Vandercook and defendants in error were citizens and residents of *California*. Vandercook *then assigned to plaintiff in error his right to recover back the moneys paid by him on the purchase price.*

The lower Court dismissed the action on the ground that plaintiffs' suit was grounded on a chose in action and that as plaintiffs' assignor could not have sued in the Federal Courts, the statute (Section 24 of the Judicial Code) prohibits such suit by his assignee.

Argument on the Law.

I.

THE MEANING AND APPLICATION OF SECTION 24 OF THE JUDICIAL CODE OF 1912.

That section is as follows:

“No District Court shall have cognizance of any suit * * * to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

This section is a substantial re-enactment of the Judiciary Act of 1789 and the later acts of 1887-8, embodied for some years prior to 1912 in section 629 of the Revised Statutes. Section 629 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 508) provided in substance that no Circuit or District Court shall “have cognizance of any suit * * * to recover the contents of any * * * chose in action in favor of any assignee or of any subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said *contents* if no assignment or transfer has been made.”

Now the terms “the contents of any promissory note or other chose in action” have been construed to embrace *the rights the instrument conferred which were capable of enforcement by suit*. They were not happily chosen to convey this meaning, but they have received this construction.

Schoecraft v. Bloxham, 124 U. S. 730; 31 L. Ed. 574;

Plant Investment Co. v. Keywest R. R., 152 U. S. 76; 38 L. Ed. 358.

When the Judicial Code of 1912 was enacted, the words “the contents of” in the Statute of 1887-8 were changed to the word “upon”, so that it now reads “suit to recover upon any promissory note or other chose in action”. This change in the wording throws the statute open to a wider and more liberal interpretation than it has heretofore received and clearly embraces the action in the case at bar.

II.

AN ACTION FOR RESTITUTION, AS ONE OF THE ALTERNATIVE REMEDIES FOR BREACH OF CONTRACT, IS AN ACTION TO RECOVER UPON A CHOSE IN ACTION WITHIN SECTION 24 OF THE JUDICIAL CODE.

The burden of the argument of plaintiff in error in its effort to support the jurisdiction of the lower Court may be thus stated—the plaintiff is not standing on his contract and seeking specific performance, or damages for its breach. The contract is extinguished because the parties have rescinded it. Upon its extinguishment, defendants are left with a legal duty to perform. Their failure to perform it is a breach of a duty imposed by law. In short, the action is brought upon *an obligation imposed by operation of law*, not upon a *contract*.

At the very outset we must point out that plaintiff in error loses sight of a very fundamental distinction, that is, the difference between a suit to recover upon a *contract* and a suit to recover upon a *chose in action* arising out of contract.

A chose in action is thus aptly defined by the Supreme Court in *Bushnell v. Kennedy*, 76 U. S. 390:

“That the indebtedness here was a chose in action cannot be doubted, for under that comprehensive description are included all debts, and all claims for damages for breach of contract, *or for torts connected with contracts.*”

If we adopt this language, then despite the contention of plaintiff in error, the action in the case at bar is one upon a chose in action within the

meaning of the statute. Plaintiff in error maintains that defendants in error are guilty of a *tortious act* in withholding the money, that defendants have no right to it and that its detention savors of a conversion (appellant's brief, p. 18). But under the very language in *Bushnell v. Kennedy, supra*, a suit to recover upon a chose in action may be one to recover "for torts connected with contracts".

To reiterate the contention of defendants in error, it is this:

The defendants in error maintain that this action is but an action for restitution, as an alternative remedy for repudiation or breach of contract; and that just as an action for *compensation* for breach of contract is a chose in action within the meaning of the statute, so also is an action for *restitution* to recover part payments under a contract which has been rescinded.

In support of its contention that the present action arises solely out of an obligation imposed by law, and that such a chose in action is not within the meaning of the statute, the plaintiff in error cites *Conn. et al. v. Chicago etc. R. R.*, 48 Fed. 177 (appellant's brief, p. 12). This was an action to recover overcharges in freight and is clearly distinguishable from the action in the case at bar on the ground that such an action sounds in tort and not in contract; in short is *ex delicto*, not *ex contractu*. It is well established that the "chose in action" meant by the statute is a chose in action arising out of contract and not out of tort.

In *Simons v. Ypsilanti Paper Company*, 33 Fed. 193, the Court recognizes the distinction very clearly in the following discussion of decided cases:

“The court takes an obvious and clear distinction between *rights of action founded upon contracts*, which contracts contain within themselves some promise or duty to be performed, and mere naked rights of action founded upon some wrongful act, some neglect or breach of duty to which the law attaches damages. ‘A suit’, said Judge Shipman, ‘to compel the performance of a promise or duty by securing to plaintiff *that which is withheld by the defendant* is a suit to recover the contents of a chose in action’, but a mere right of action to recover damages imposed by law for a delinquency is not within the prohibition of the statute and the objection to the jurisdiction fails.”

This same distinction is recognized in *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113; and in *Mexican National Ry. Co. v. Davidson*, 157 U. S. 201.

In short, the common law imposed the duty on common carriers to charge a reasonable compensation and an action to recover an overcharge on excess beyond reasonable compensation sounds in tort and not in contract.

Graham v. C. M. & St. P. Ry. Co., 10 N. W. 609.

Hence, the case of *Conn. et al. v. Chicago, etc. Ry. Co.* falls among such cases as *Ambler v. Eppinger*, 137 U. S. 480, an action to recover damages for trespass in entering upon lands and cutting trees;

Deshler v. Dodge, 16 How. 622, an action to replevin for a quantity of bank bills; *Barney v. Globe Bank*, 5 Blatchf. 107, a suit against a bank to recover for neglecting to protest drafts, and many others.

That the Court rested its decision in *Conn. et al. v. Chicago, etc. Ry. Co.*, *supra*, on the above cases is clear from its language at page 178:

“The limitation thus enacted in regard to suits upon assigned causes of action, is expressly confined to those brought to recover the contents of a promissory note or other chose in action—and cannot be made applicable to claims of the nature of *those declared upon in the present action*, which are for damages resulting from the alleged violation of the duty imposed on the railway company to charge only legal rates for transportation of property.”

In the case of *Glock v. Howard and Wilson Colony Company*, 123 Cal. 1, Judge Henshaw (at page 10) states the remedies of a vendee on a breach by the vendor of a covenant to convey as follows:

“Now, in such contracts, upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: He may stand upon the contract and sue at law for damages for the breach. Here his recovery will be governed by section 3306 of the Civil Code; or, still standing upon his contract, he may go into equity, seeking its specific performance; or, he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor’s breach as an abandonment, he may himself abandon it, when, the contract having

thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise."

Taking these remedies in turn, it is clear that actions in pursuit thereof are actions to recover upon a chose in action within the meaning of the statute:

1. Taking the first remedy, that of an action at law for damages for the breach of a contract, the following cases support the proposition that suit cannot be maintained by an assignee thereof unless it could have been maintained by the assignor.

Simons v. Ypsilanti Paper Co., 33 Fed. 193, an action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract;

Republic Iron Min. Co. v. Jones, 37 Fed. 721, an action for a breach of contract of lease;

Jackson v. Pearson, 60 Fed. 113; and

Mexican Nat. R. R. Co. v. Davidson, 157 U. S. 201.

2. Taking the second remedy, that of specific performance, in equity, the following cases support the proposition that an assignee of the right to maintain an action therefor cannot maintain the action unless it could have been maintained by his assignor.

Boston Safety etc. Co. v. Plattsmouth, 76 Fed. 881;

a mortgagee holding by assignment a contract made between two corporations of the same state cannot sue for specific performance.

Corbin v. Black Hawk Co., 105 U. S. 659, an action to compel the specific performance of a contract to convey land.

Shoencraft v. Bloxham, 124 U. S. 730; and *Plant Investment Co. v. Jacksonville etc. R. Co.*, 152 U. S. 71.

3. An action by an assignee to recover liquidated damages and an action to recover restitution seem never to have arisen under the statute in question, but the defendants respectfully submit that they should be treated as actions "to recover upon a chose in action" within the meaning of the statute. In the case at bar the plaintiff has elected to pursue the remedy of recovering the part payments which it made under the contract, and which the defendants, in equity and good conscience, should restore; rather than sue for compensation in damages for breach of defendants' contract to transfer the stock. The situation is simply this: Upon the repudiation of the contract by the defendants, the plaintiff has elected to *disregard* its contract; that is, to quit performance on his side, refuse to accept further performance by the other party, and relinquish its right to compensatory damages measured by reference to the terms of the contract, and demand resti-

tution of the payments he has made under the contract. This right of restitution would therefore seem to be an alternative remedial right arising from the violation of the contract and in pursuit of such remedial right the plaintiff is suing "to recover upon a chose in action" within the meaning of the statute, equally as though he had elected to sue for damages for its breach. As said by Mr. Justice Grier in the early case of *Sheldon v. Hill*, 8 How. 441:

"The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another, by action."

The mischief which the statute was aimed to prevent was the colorable and collusive assignment, sale or transfer of the subject matter of a suit made for the mere purpose of conferring jurisdiction of the Federal Courts, and it is apparent that the very evil which this statute was aimed to prevent will arise unless this demurrer is sustained.

III.

CONCEDING, FOR THE SAKE OF ARGUMENT, THAT THIS ACTION IS NOT A SUIT UPON THE KIND OF A CHOSE IN ACTION REFERRED TO IN THE STATUTE, BECAUSE THE ACTION IS UPON OBLIGATION CREATED BY LAW; SO, ALSO, IS AN ACTION UPON A JUDGMENT, AND THE LATTER IS CLEARLY WITHIN THE STATUTE.

The plaintiff in error maintains that after the rescission of the contract the contract was at an end.

The suit is not brought on that contract. It is now as if that contract had never existed, but the law, by express mandate, laid upon the defendants the obligation to restore to Vandercook the consideration and that this obligation is not one arising from contract, but is one arising from a duty imposed by law.

Now, the language of the plaintiff in its brief is equally applicable and, in fact, even stronger in case of an action brought upon a judgment. Once a judgment has been obtained in an action on a contract, the cause of action is merged in the judgment, and "it is as if the contract never existed".

Yet the authorities are uniformly to the effect that the assignee of a judgment founded on a contract cannot maintain a suit thereon in a Federal Court unless such suit might have been prosecuted there, had no assignment been made.

Walker v. Powers, 104 U. S. 245;

Metcalf v. Watertown, 125 U. S. 586;

Mississippi Mills v. Cohn, 150 U. S. 202.

In conclusion we submit that this action for restitution of money paid under a contract which has been rescinded is but the adoption of one of the four alternative remedies for breach of contract and is therefore controlled by section 24 of the Judicial Code. It is nothing more nor less than an action "to recover upon a chose in action" arising out of contract and accordingly, since plaintiff's assignor could not maintain it, plaintiff cannot.

We therefore ask that the judgment of the District Court dismissing the complaint be affirmed.

Dated, San Francisco,
March 10, 1915.

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